

Chapter VIII

EXPERT REVIEWER PROGRAM

A. General Description of Functions

In quality of care disciplinary matters against a physician, expert opinion testimony is required to prove or disprove that the physician performed in accordance with the prevailing standard of care.¹⁹² Because the burden of proof is on the Board, it must produce one or more physician witnesses with experience and expertise in the specialty or procedure at issue. That expert witness must review all the evidence in the case, testify to the standard of care applicable to each procedure performed, opine as to whether the subject physician's conduct departed from that standard of care and to what degree, and explain the justification or basis for his opinion. This burden requires MBC to recruit, train, and select expert witnesses who are willing to review disciplinary investigations against other physicians, write detailed memoranda and opinions, and — if necessary — testify orally at an evidentiary hearing.

As described in Chapter IV, MBC — dissatisfied with the selection procedure for and performance of its expert witnesses — created a new “Expert Reviewer Program” in 1994.¹⁹³ The Board adopted minimum qualifications for its expert reviewers and established procedures for the appointment, training, oversight, evaluation, and reappointment of a pool of expert reviewers who would be available when investigations reach a point where independent and objective expert input is essential. In the past decade, MBC's Expert Reviewer Program has recruited and trained a list of over 750 expert reviewers in all specialties throughout the state. The Board recruits for experts in a variety of ways, but primarily through its *Action Report* licensee newsletter, speeches and presentations made by Board members and staff to hospital personnel and medical societies, and recruitment efforts by district office medical consultants in their local communities.

Appointment as an expert reviewer. A physician interested in becoming a Medical Board expert reviewer must complete an application (which is available on MBC's Web site) which is

¹⁹² *Hanson v. Grode* (1999) 76 Cal. App. 4th 601, 606–07; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal. 4th 992, 1001.

¹⁹³ See *supra* Ch. IV.D.

reviewed by Board staff to ensure that the physician meets the minimum qualifications for the program (see below). If so, the physician completes a training program that consists of viewing a 45-minute videotape and reading a manual prepared especially for MBC expert witnesses.¹⁹⁴ The physician is then appointed to a two-year term as an expert reviewer, and his name is added to a computerized list of experts (by specialty, subspecialty, and geographic location) that is maintained and updated quarterly at headquarters and is available to all MBC district offices. The expert's résumé is scanned into the database as well, so that district office staff have access to the physician's complete educational and professional history. The expert serves for a term of two years, at which point he must apply for reappointment to another term.

Minimum qualifications. Currently, physicians who review disciplinary cases and testify as experts for MBC must have a current California license in good standing, with no prior discipline, no pending accusation, no current complaints, and no complaints closed within the past five years for insufficient evidence. They must be board-certified by one of the specialty boards approved by the American Board of Medical Specialties (or an equivalent board). They must have a minimum of three years of experience in their specialty, and must be in “active practice”¹⁹⁵ or retired from active practice for no more than two years at the time of appointment as an expert witnesses. Peer review experience is recommended but not required.

Method of selection. Expert witnesses are retained by MBC after the investigation in a quality of care matter has been completed, and the investigator and district office medical consultant agree that the investigation tends to indicate a disciplinable violation that should be reviewed by an expert witness. Generally, the district office medical consultant is responsible for obtaining an appropriate expert reviewer to review the investigation report and medical records, and provide a written expert opinion. However, the MC often undertakes this function in conjunction with the investigator, and the investigator is responsible for monitoring the status of the expert review to ensure the written expert opinion is submitted in a timely manner.

The MC first looks to the list of trained experts maintained by the Expert Reviewer Program and selects an expert; the investigator must query the expert's disciplinary history and the Civil Index to ensure that she still meets the Program's requirements. Once these checks have been completed,

¹⁹⁴ Veteran investigators told us that, in years past, district office supervisors and medical consultants conducted training sessions for experts in which they would review examples of well-written expert reports, discuss the guidelines for writing an expert report, and answer the experts' questions. Many investigators and district office supervisors believe MBC — when its funding is restored — should resume these in-person training sessions for expert witnesses because they enhance the quality of the experts' work.

¹⁹⁵ “Active practice” is defined as at least 80 hours per month in direct patient care or clinical activity or teaching, at least 40 hours of which is direct patient care. Medical Board of California, *Enforcement Operations Manual*, at Ch. 13, § 13.1.

the MC or investigator contacts the expert and assesses her actual experience and expertise in the procedure or treatment at issue in the matter, and availability to perform the review. During the initial telephone contact, the MC or investigator discusses several factors listed on a “conflicts checklist” to ensure that the expert has no “disqualifying criteria” that would make her ineligible to review the particular matter. “Disqualifying criteria” include personal or financial conflicts of interest, a complaint history, or insufficient number of years of experience in the specialty at issue.

Once an expert is chosen, the investigator and medical consultant — sometimes assisted by the DIDO DAG in the district office — assemble the investigative file, medical records, and other documentary evidence, determine which materials to forward to the expert, and send the package to the expert with a cover letter. Experts are expected to review the materials, draft a memorandum in a specified format,¹⁹⁶ and return the file within 30 days. MBC requires its experts to reduce their opinions to writing, and written opinions of MBC experts are discoverable; they are always shared with the defense. However, many defense counsel instruct their experts not to reduce their opinions to writing so they cannot be discovered by HQE prior to the hearing.

Occasionally, it is necessary for the investigator and medical consultant to “go off the list” in an effort to find a qualified expert who is willing to review records and testify. In subspecialties in which there are few practitioners, all the practitioners know each other and may have personal conflicts or be unwilling to testify against a colleague. Sometimes MBC is required to select an expert who has not formally applied to, been evaluated by, and been trained by the Expert Reviewer Program. This is approved in rare circumstances; however, such “off-the-list” experts are expected to meet the Program’s minimum qualifications, and must be approved by a Supervising Investigator II.

Payment and protection. MBC expert witnesses are paid \$100 per hour for reviewing records and writing a detailed expert opinion. If they provide oral testimony at an evidentiary hearing, they are paid \$200 per hour for that testimony.

Civil Code section 43.8 provides absolute immunity from civil liability for physicians who serve as expert reviewers and expert witnesses for MBC.¹⁹⁷ Additionally, if a Medical Board expert

¹⁹⁶ The expert opinion must (1) describe the records reviewed, (2) summarize the case, (3) state the standard of care at the time of the event(s) in question, (4) determine if the care in question was or was not a deviation from the standard of practice, (5) define the deviation from the standard in terms of no departure, simple departure, or extreme departure, and (6) summarize the review.

¹⁹⁷ *Johnson v. Superior Court of Los Angeles County (Gass, Real Party in Interest)* (1994) 25 Cal. App. 4th 1564, 1568–70 (“[s]ection 43.8 was amended in 1990 as part of Senate Bill No. 2375, which implemented a comprehensive reform of this state’s system of discipline against medical practitioners Expert consultants are vital to the Boards’ task. Suffice it to say that the threat of being sued for malicious prosecution would deter all but the most fearless experts from serving as consultants to the Boards. Without those experts, the Boards’ disciplinary activities

is sued civilly over acts taken in the course and scope of assisting MBC as an expert reviewer, the Attorney General's Office will defend the expert and assert the immunity.¹⁹⁸

Evaluation of experts by investigators, MCs, and DAGs. Investigators, medical consultants, and DAGs are encouraged to complete evaluation forms on the performance of expert reviewers in reviewing records, drafting the expert opinion, and providing oral testimony. This information assists the Expert Reviewer Program in determining whether to renew the appointment of an expert reviewer and/or reuse the expert in future proceedings.

Evaluation of experience by experts. In July 2003, the Expert Reviewer Program began to circulate a "feedback" survey form to experts to enable them to evaluate their experience as an expert. In the past year, 214 experts returned a completed form to MBC. Over 94% said they would be willing to accept more MBC cases for review. Over 96% said they were "encouraged to render an unbiased opinion." On the issue whether MBC's reimbursement rate is appropriate for expert review, the experts were split: 47% said yes, and 49% said no. On the issue whether they would be willing to review more cases if they received continuing medical education credit rather than money, 89% said no.

Business and Professions Code section 2220.1(c)(2) requires the MBC Enforcement Monitor to "evaluate the method used by investigators in the regional offices for selecting experts to review cases to determine if the experts are selected on an impartial basis and to recommend methods of improving the selection process." The selection method is described above. The Monitor believes MBC selects its expert witnesses on an impartial basis for a number of reasons:

(1) While the database of experts consulted by investigators and MCs contains information on whether (and how many times) a particular expert has been used and general impressions of the expert's performance, it does not contain information on how the expert has opined in prior cases (for example, whether the expert found no departure or an extreme departure).

(2) The "conflicts checklist" that is used by MCs and investigators when initially contacting a prospective expert requires MBC to affirmatively determine that the expert has no personal or financial conflict of interest which would prevent him from being objective and unbiased. The form also requires the investigator or MBC to tell the prospective expert that "the request for this review does not imply that there is a deviation from the standard of care." And most investigators and MCs we interviewed said they inform prospective experts that MBC wants an objective and unbiased opinion — whatever that opinion might be.

would soon grind to a halt").

¹⁹⁸ Bus. & Prof. Code § 2317.

(3) As noted above, over 96% of experts who returned MBC’s survey form said they were “encouraged to render an unbiased opinion.”

(4) Almost every investigator and medical consultant we interviewed said they have little interest in how the expert opines. They are primarily interested in the expert’s ability to carefully review medical records, clearly articulate the standard of care, adequately explain whether the subject physician’s conduct departed from that standard, and justify the basis for their opinion. When they find an expert with superior evaluative and written communications skills, they readily admit that they “go back to the well” and use that expert whenever they have a case in that expert’s specialty — but solely because the expert is experienced, competent, and can clearly communicate a well-reasoned opinion.

(5) Although MBC has no standards or policy on the reuse of experts, it constantly advertises for new experts and encourages MCs and investigators to choose experts who have not been used before. MCs and investigators admit they are sometimes reluctant to use a new expert because they have no familiarity with his work. In the words of one investigator, “We’re guilty of overutilizing certain experts, not because they come back with a departure finding but because they’re quick and do a thorough job. My worst fear as an investigator is to send a case to an inexperienced expert who returns a ‘no violation’ finding. You’re done — you can’t go ‘expert-shopping.’”

(6) In a deliberate effort not to bias expert witnesses, MBC’s *Enforcement Operations Manual* instructs investigators, MCs, and DAGs to ensure that the materials given to expert witnesses at the outset of their review do not contain information that might bias the expert (such as prior disciplinary action or malpractice history of the subject physician) or the opinion of any other physician who has reviewed the case.¹⁹⁹ The *Manual* directs investigators, MCs, and DDO DAGs to ensure that the reports of the CCU reviewer and district office medical consultant do not contain explicit opinions about whether the subject physician’s conduct departed from the standard of care. Also, in section 801 cases following a civil judgment or settlement, the *Manual* instructs MCs and investigators to withhold depositions of expert witnesses in the civil case from the MBC expert until after he has had an opportunity to review all the evidence and reach his own conclusion. After the MBC expert has opined, he may be shown the civil depositions or other expert opinions in the matter and asked if those opinions change his opinion. But at the outset, MBC wants its experts to render an independent and unbiased opinion.

¹⁹⁹ Medical Board of California, *Enforcement Operations Manual*, at Ch. 7, § 7.4.

B. Initial Concerns of the MBC Enforcement Monitor

1. Average expert reviewer cycle times are excessive.

Within the past year, MBC instituted the use of codes in its computer system to capture the average number of days between the time a completed investigation is shipped to an expert reviewer and the time the expert opinion is returned to MBC. While MBC's goal is 30 days, the average turnaround time for expert opinions is 69 days — over two times its goal.

Further, MCs and investigators note that the 69-day timeframe discussed above does not include the time it takes them to simply locate a qualified reviewer. Many investigators and MCs complain that prospective experts fail to return phone calls to apprise MBC of their interest in the matter and/or availability — and this lag time is exacerbated by the fact that most MCs are part-time and not in the office every day; therefore, they are not able to easily ascertain whether their call has been returned, whether they should make another call, and/or whether they should choose a different expert.

2. There is a lack of qualified experts in many specialties, and the CCU specialty reviewer requirement is siphoning off some experts who would otherwise review cases in the field.

Despite MBC's recruitment efforts, there are not always a sufficient number of qualified experts in high-demand specialties and subspecialties willing to work for \$100 per hour. This leads to delay in locating qualified experts and in the use of "off-the-list" experts on some occasions. Further, section 2220.08's requirement that "specialty reviewers" evaluate quality of care complaints in CCU has led CCU to "borrow" experts from the Expert Reviewer Program's list. This costs MBC more money (because experts on the Expert Reviewer Program list are paid more than are CCU experts, and because experts often do more work than is necessary at the CCU stage) and deprives MBC field offices of using those physicians as expert reviewers for completed investigations.

3. There is no requirement that expert testimony be reduced to writing and/or exchanged before hearing.

As described above, MBC requires its experts to reduce their expert opinions to writing — and those expert opinions are immediately discoverable by the defense. However, defense counsel frequently instruct their experts not to reduce their opinions to writing so the HQE DAG has no idea of the substance of defense counsel's expert opinion until that expert takes the stand at the evidentiary hearing.

This practice results in the unfair "sandbagging" of the DAG at the hearing, and stifles the possibility of prehearing settlement. Although true bilateral discovery is not a feature of

administrative hearings under the Administrative Procedure Act, the general discovery principle of eliminating undue litigation surprise is a public policy with important application here. The expert medical opinions in these MBC administrative hearings go to the heart of the Board's case and are partly or entirely dispositive of the result. Litigation surprise regarding this central element of the administrative action disserves all parties to the process and the public interest as a whole.

Litigation surprise over expert testimony is very costly to respondents, as it often means unnecessary trial preparation and hearing expenses because potential early case dispositions, including possible dismissals of accusations, cannot take place (in the absence of expert views raising doubts about MBC's case). This surprise is equally costly to MBC and the public, as scarce investigator and attorney resources are often allocated to preparation and trial of matters which could have been resolved more expeditiously. Several DAGs we interviewed stated that, had they seen the defense expert's opinion at an earlier point in the process, they would not have filed an accusation (much less proceeded to hearing), or would have been willing to negotiate a prompt case settlement agreeable to the physician. And absence of early expert opinion exchange clearly harms the public interest in quicker resolution of cases, shorter case cycle times, and fewer costly formal hearings.

Defense counsel may perceive some short-term adversarial advantage in depriving the trial DAG of full knowledge of the weaknesses of MBC's case, according to defense experts. And at least some defense counsel may be influenced consciously or unconsciously by a financial incentive to take cases to hearing. However, the Monitor is confident that many defense counsel, and virtually every client, would rather the client be spared the filing of an accusation (if at all possible) or spared the burdensome hearing by virtue of a prompt settlement. Keeping the representatives of the public in the dark until the last possible minute does not, in truth, advance the long-term interests of any party to this process. A procedure requiring pre-trial exchange of written expert direct testimony (similar to current federal court practice in many complex litigation matters, such as antitrust cases) would benefit both parties and the cause of quick and efficient justice.

4. The expert reviewer handbook contained errors.

The *Individual Study Program for Expert Reviewers* provided to the Monitor in 2003 was last updated in October 2002, and did not appear to have been revised to conform to the changes made by SB 1950 (Figueroa). It contained a significant error regarding the definition of "repeated negligent acts"²⁰⁰ and other lesser errors. The manual has been reviewed by HQE and the errors have been corrected.

²⁰⁰ The *Individual Study Program for Expert Reviewers* (October 2002) states that MBC must demonstrate either an extreme departure or a "pattern of departures" from the standard of care. No such showing of a "pattern" is necessary to prove repeated negligent acts. See *Zabetian v. Medical Board* (2000) 80 Cal. App. 4th 462, 468. However, at a 2003 oral argument on a nonadoption, the Monitor heard a defense attorney inform a DMQ panel that "your own procedure manual requires you to find a pattern" in order to discipline for repeated negligent acts.

C. Initial Recommendations of the MBC Enforcement Monitor

Recommendation #30: The Medical Practice Act should be amended to provide that any party wishing to rely on expert testimony must reduce that expert testimony to writing and provide it to the other party well in advance of the hearing. The exchange of expert witness opinions prior to hearing will lead to more settlements and will remove the current and unfair “sandbagging” of the DAG at hearings on most occasions.

Recommendation #31: MBC should make better use of its district office medical consultants, existing expert witnesses, Board members, and the California Medical Association to recruit more expert reviewers. MBC clearly needs more qualified experts who have time to devote to reviewing MBC cases and returning expert opinions in a timely manner. Once its medical consultant hours are restored,²⁰¹ the Board should make better use of its district office medical consultants to aggressively recruit expert reviewers in their local communities; additionally, it should attempt to utilize its existing expert witnesses who are familiar with the process to recruit other experts. According to MBC Enforcement Committee Chair Dr. Ron Wender, expert review “should be considered community service and medical staffs of hospitals should be approached in addition to individuals in the same way as the peer review function is done within hospitals . . . [MBC should] utilize the California Medical Association, as well as the medical school faculties throughout the state and key designated hospital staff for this project.”²⁰²

Recommendation #32: MBC should consider paying its experts more, and resume in-person training sessions for its experts. Although physicians who serve MBC as expert witness clearly aren’t in it for the money, 49% of the experts who returned MBC’s survey said they weren’t paid enough for their services. Defense experts are routinely paid \$500–\$750 per hour, and MBC simply cannot compete for the best experts at \$100 per hour. If MBC’s budget change proposal is approved, MBC might want to consider raising its expert witness fees. Additionally, if its funding is restored, MBC should resume local, in-person training sessions for expert witnesses conducted by district office supervisors and medical consultants, to ensure that experts have an opportunity to interact with district office personnel, understand the Board’s expectations, and are receive “hands-on” training in the skills required to be an effective expert witness.

²⁰¹ See *supra* Ch. VII.B.5.

²⁰² Ronald H. Wender, MD, Chair, MBC Enforcement Committee, *New Proposal for Reorganization of the Enforcement Program* (Oct. 7, 2002).